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BRIEF FOR PLAINTIFFS IN ERROR.

Supreme Court of the United States.

No. 130.

LOUISA SAUER, GERTRUDE CRANE, INDIVIDUALLY AND AS ADMINISTRATRIX OF GEORGE W. SAUER, DECEASED, ET AL.,

Plaintiffs-in-Error,

against

THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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Supreme Court of the United States.

LOUISA SAUER, GERTRUDE CRANE, Individually and as Administratrix of George W. Sauer, deceased, *et al.*,
Plaintiffs in Error,

against

THE CITY OF NEW YORK.

No. 130.

October Term, 1906.

Brief for Plaintiffs in Error.

In error to the Supreme Court of the State of New York, to review a judgment dismissing the complaint in an action by an abutting owner for an injunction or compensation for the impairment of his easements of light, air and access, caused by the erection of an elevated steel roadway or viaduct, which judgment was entered pursuant to the mandate of the Court of Appeals of the State of New York, which affirmed the judgment of the Appellate Division of the Supreme Court, First Department, affirming the judgment in favor of the defendant entered at a Special Term in and for the County of New York.

The case in the Appellate Division of the Supreme Court is reported in *90 App. Div., 36*; in the Court of Appeals in *180 New York, 27*.

The original plaintiff died pending appeal to this Court, and the plaintiffs in error, his administratrix and heirs at law were substituted as parties plaintiff by order of the New York Supreme Court, dated April 25, 1905 (*fols. 47–48*).

Statement of Facts.

The case was submitted upon an agreed statement of facts, inquiry as to the amount of the plaintiff's damages being deferred until after the question of law had been settled (*fols. 21–32*).

The essential facts are as follows:

In 1886, plaintiff bought the premises at the southwest corner of 155th street and Eighth avenue, in New York City, fronting 49 feet 11 inches on Eighth avenue and 175 feet on 155th street (*fol. 21*).

At this time, there were buildings on the premises known as the "ATLANTA CASINO," which had been used continuously for several years as a place of public resort, recreation and amusement (*fol. 21*).

Prior to August 1, 1890, plaintiff enlarged and improved these buildings and maintained there a restaurant, concert and dancing hall, billiard rooms, bowling alleys, open-air piazza and balconies (*fols. 21, 22*).

The full and uninterrupted use of the easements of light, air and access appurtenant to the premises were necessary and valuable to the use and enjoyment thereof for the purposes of plaintiff's business (*fol. 22*).

In 1897 these buildings were destroyed by fire, and the land is now vacant (*fol. 22*).

Prior to June 15, 1887, 155th street had been regulated and graded from Eighth avenue westerly to Bradhurst avenue, and Eighth avenue had been regulated, graded and paved in front of plaintiff's land and to a point near 166th street. The title in fee simple to the land covered by Eighth avenue and 155th had been acquired by the city, according to the statutes in such case made and provided prior to 1886, and these streets had been designated as public streets and highways, and were used and

maintained as such streets and highways in the City of New York (*fols. 21, 22*).

West of Bradhurst avenue, and parallel with it, a bluff rises to a height of seventy feet above the avenue. From the foot of this bluff to the Harlem River the land is substantially on a level plane.

155th street has never been regulated or graded westerly from its intersection with Bradhurst avenue to the face of the bluff (*fol. 22*).

On June 15, 1887, the Legislature of the State of New York enacted Chapter 576 of the Laws of 1887, providing for the construction of the viaduct in question (*fol.* 22).

CHAPTER 576.

An Act to provide for the improvement and to regulate the use of One Hundred and Fifty-fifth Street, from St. Nicholas Place to Macomb's Dam Bridge, in the City of New York.

Passed June 15, 1887; three-fifths being present.

The People of the State of New York Represented in Senate and Assembly, do enact as follows:

SECTION 1. The commissioner of public works in the City of New York is hereby authorized and empowered to improve and regulate the use of One Hundred and Fifty-fifth Street in said city, and for that purpose to erect and construct over and along said street from the easterly line of St. Nicholas Place to Macomb's Dam Bridge an elevated iron roadway, viaduct or bridge, with the necessary abutments, arches over intersecting avenues and approaches thereto for the passage of animals, persons, vehicles and traffic, provided that nothing shall be done under this act until the approval of the board of estimate and apportionment shall have been given.

SECTION 2. The said commissioner of public works shall make such changes in the

grade lines of streets leading to said elevated roadway, viaduct or bridge as may be made necessary to meet the requirements of the same; and it shall be the duty of the said commissioner of public works to prepare, or cause to be prepared, plans and specifications for the construction of said improvement, and before the letting or doing of said work the said plans and specifications shall be approved by the board of estimate and apportionment of said city.

SECTION 3. The board of estimate and apportionment of the City of New York may, on the requisition of the said commissioner of public works, specifying the amount required for the work and materials of constructing said improvement, raise such amount by taxation on the real and personal property liable to taxation in said city. Or if the said board of estimate and apportionment shall, in their discretion, determine that the amount so required or a sum not exceeding one-half of said amount, shall be raised by assessment upon property deemed to be benefited by said improvement; then such amount so determined by them shall be assessed by the board of assessors upon the property benefited, and all provisions of law relative to the collection of assessments for local improvements shall apply to such assessments. The comptroller of said city shall pay from such moneys, upon vouchers certified by such commissioner of public works, in the form to be approved by said comptroller, the cost of the materials, labor and services required in the construction of said improvement, and the necessary expenses connected therewith.

SECTION 4. No horse, cable or other car track or railway shall be permitted in the roadway or footwalks provided for in this act.

SECTION 5. This act shall take effect immediately (*fols. 26, 27*).

The structure was built between August 1, 1890, and October 3, 1893 (*fol. 23*).

155th street is 100 feet wide. The viaduct on that street is built upon two lines of iron columns, which are one foot six inches square, and which are placed in the roadway of the street. The curb lines on either side of the street are distant about ten feet from the nearest line of columns. There is a distance of about forty-three feet between the center of the columns, measuring east and west, and about forty feet measuring north and south (*fol. 23*).

The platform of the viaduct on 155th street, adjacent to plaintiff's land, is about fifty feet above the pavement of the street. This platform has an extreme width of sixty-three feet. Its southerly edge is distant at right angles eighteen feet three inches from the northerly line of the plaintiff's land. It is built of iron beams, on which is laid a pavement of asphalt and paving blocks. It is a solid structure from edge to edge (*fol. 23*).

Eighth avenue is one hundred feet wide. The platform of the viaduct built on Eighth avenue is of the same character as in 155th street, and it is extended into the avenue north and south from the lines of 155th street. It forms a quadrilateral, having an extreme length of about one hundred and sixty feet north and south, and an extreme width of about eighty feet east and west. It is about fifty feet in height above the pavement and has a level surface (*fol. 24*).

In front of the plaintiff's land it extends southerly along the avenue for a distance of about thirty feet, and two of its supporting columns, which are eighteen inches square, are on the sidewalk of Eighth avenue in front of plaintiff's land, and about fifteen feet six inches from the building line of plaintiff's land. The extreme westerly edge of the platform in Eighth avenue is distant at right

angles ten feet from the building line of the plaintiff's land (*fol. 24*).

The sidewalks of both Eighth avenue and 155th street are twenty feet wide, measuring from the building line to the curb. The platform of the viaduct on 155th street is inclined easterly toward McComb's Dam Bridge. Between the supporting columns of the viaduct are placed trusses and rods necessary for its proper construction (*fol. 24*). A stairway is built from the platform of the viaduct, within the lines of 155th street and in front of the plaintiff's land, to the southwesterly corner of 155th street and Eighth avenue. There is also as part of the structure in front of plaintiff's land, a platform or passageway on a level with the elevated railway station, with which platform both the north and south stairways from the main platform of the viaduct connect. It extends north and south on West 155th street, and access is had from it to the elevated railway station (*fol. 24*).

The viaduct was constructed to be used solely as a public highway for foot passengers and vehicles, and for the use and convenience of the public (*fol. 25*).

The grades and surface of 155th street and Eighth avenue, in front of plaintiff's premises, as they existed on June 15th, 1887, have not been changed by the erection of the viaduct, and the surface of said streets remain as before, open to the public, except for the obstruction by the columns of the viaduct, as before stated (*fol. 25*).

The ingress and egress to and from the plaintiff's land, the buildings erected thereon, and the free and uninterrupted passage and circulation of light and air to such land and premises have been, and are now, interfered with and impaired by the erection and maintenance of the viaduct in the manner hereinbefore stated. Dirt, dust and noise arise from the maintenance of the viaduct (*fol. 25*).

Prior to the commencement of the present action, a common law action for damages was brought by plaintiff against the City of New York. The trial of this action resulted in a verdict in plaintiff's favor for $30,000 in 1898. The Supreme Court, Appellate Division, First Department, reversed this verdict in 1899 because evidence had been admitted establishing plaintiff's loss of profits since the construction of the viaduct.

The trial Court and the Appellate Division unanimously held that the *Elevated Railroad* cases governed and that plaintiff was entitled to compensation for the destruction of his easements by this viaduct.

> *Sauer* vs. *the Mayor, 44 App. Div., 305 (full opinion printed in Appendix I of this brief).*

The Appellate Division, First Department, had already passed upon the legal status of the viaduct, in an action brought by the Elevated Railway Co. to recover expenses it incurred in making alterations rendered necessary by the viaduct.

Judgment was given for plaintiff, the Court by ALTON B. PARKER, *J.*, holding the city liable for such damages, and deciding flatly that the viaduct was not a change of grade. This decision was rendered in 1895.

> *Manhattan R. Co.* vs. *Mayor, 89 Hun, 429.*

Subsequent to these two decisions, there came up the litigations known as the *Park Avenue* cases. The first of these—*Lewis* vs. *N. Y. & H. R. R., 162 New York, 202*—was decided in favor of the abutter, upon the authority of the Elevated Railroad cases in 1900.

Then followed in December, 1901—*Fries* vs. *N. Y. & H. R. R. Co., 169 New York, 270*, and *Muhl-*

ker vs. *N. Y. & H. R. R. R. Co., 173 New York, 549*, in 1903, in which the Court of Appeals declared the Lewis case to have been improvidently decided, and asserted the command and public purpose of the statute under which the railroad built the Park avenue viaduct as superior to the private property rights of the abutter.

These decisions caused a complete reversal of view in the lower courts as to the duty of the city to compensate the abutter for the damage to his easements by the viaduct in question; and in the present action, in July, 1903, the trial Court dismissed the complaint, specifically saying that the *Fries* and *Muhlker* cases were directly inconsistent with *Sauer* vs. *Mayor*, calling the viaduct a public improvement and resting its decision principally upon

Muhlker vs. *N. Y. & Harlem River R. R. Co., 173 N. Y., 549.*
Fries vs. *N. Y. & Harlem River R. R. Co., 169 N. Y., 270.*

The Appellate Division, First Department, adopted the same view, viz., that, in view of the fact that the structure was erected to facilitate public travel, plaintiff had no redress, completely reversing its former decision.

Sauer vs. *The City, 90 App. Div., 36.*

The Court of Appeals, in December 1904, two judges out of a court of six dissenting, affirmed the judgment below.

Sauer vs. *The City, 180 New York, 27.*

CULLEN, *Ch. J.*, who concurred in the majority opinion, had been one of the dissenting Judges in the early Park avenue cases. In the Muhlker case he announced that he should regard subsequent discussion of the questions as foreclosed by the action of the majority of the Court.

This case, therefore, went through the courts of the State of New York, while the doctrine of the Patk avenue cases obtained. It is clearly apparent from the decisions above mentioned, that, but for the Park avenue cases an entirely different result would have been reached.

In April 1905, this court reversed the first of the Park avenue cases to come before it, holding that under the Elevated Railroad cases, abutters in New York City had a contract and property right in easements of light, air and access, which could not be taken from them without compensation by the erection of a viaduct by a railroad under statutory command.

Muhlker vs. *N. Y. & H. R. R., 197 U. S., 544.*

Two more of the Park avenue cases have been reversed by this court.

Kierns vs. *N. Y. & H. R. Co., 198 U. S., 390.*
Birrell vs. *N. Y. & H. R. Co., 198 U. S., 390.*

Specifications of Error.

Plaintiffs in error claim that the Court of Appeals of the State of New York erred in deciding that the complaint should be dismissed for the following reasons:

1st. Because by such decision the City of New York is permitted, under Chapter 576 of the Session Laws of 1887, to deprive plaintiff of his property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

2nd. Because, as construed by the said Court, Chapter 576 of the Session Laws of 1887 of the

State of New York violates the provisions of Section 10, Article I, of the Constitution of the United States, in that it impairs the obligation of the contract set forth in the statutes of the State of New York, Session Laws 1813, Chapter 86, Section 178; Session Laws 188, Chapter 402, Section 990, and Session Laws 1903, Chapter 418, Section 990, under which the defendant acquired title to, and maintained the streets in question (*fols. 62–66*).

The amended remittitur and the judgment entered thereon show that the Court of Appeals ruled directly against plaintiff upon these questions (*p. 1, fols. a, b, fol. 54*).

POINTS.

I.

The general character of the viaduct and its effect upon plaintiffs' property.

A high ridge runs substantially north and south, through the center of the upper portion of Manhattan Island. West of this ridge the land is high, sloping abruptly to the Hudson river. East of this ridge, the ground is low and extends in practically a level plane, to the Harlem river.

The easterly edge of the ridge is a bluff, seventy feet high, which lies between and runs parallel with Bradhurst avenue and St. Nicholas place, St. Nicholas place being on the high ground west of the bluff, and Bradhurst avenue on the low ground east of the bluff.

155th street runs easterly from a point west of

Bradhurst avenue at right angles to this bluff, across the level and low half of the island to the Harlem river and McCombs' Dam Bridge, beyond which lies the Borough of the Bronx.

The viaduct runs from St. Nicholas place easterly to McComb's Dam Bridge, through the entire length of 155th street.

The purpose of the viaduct as expressed in the statute authorizing its construction was "for the passage of animals, persons, vehicles and traffic" * * *" No horse, cable or other car track or railway shall be permitted in the roadway or footwalks provided for in this Act."

Its use is limited to pedestrians and those driving vehicles; to the latter it affords a convenient elevated roadway, running from the lower end of the Speedway to McComb's Dam Bridge, connecting the Speedway and the drives along the Hudson with those in the Bronx.

That it was not constructed to further public travel as a whole, is shown by the exclusion of the generally adopted means of travel, *i. e.*, street railways, from its surface.

It is a driveway with footpaths, and is part of a system of driveways. It is for the use and convenience of the public, but the use is that of pleasure or luxury, rather than necessity.

It is conceded in paragraph 10 of the agreed statement of facts that—

> "the ingress and egress to and from the plaintiff's land and the building erected thereon, and the free and uninterrupted passage and circulation of light and air to such land and premises have been and now are interfered with and impaired by the erection and maintenance of the viaduct in the manner hereinbefore stated. Dirt, dust and noise arise from the maintenance of the viaduct" (*fols. 99, 100*).

This was also specifically found as a part by the trial Court (*fols. 63, 64*).

This established impairment of plaintiff's easements is the same in kind as that in the Elevated Railroad cases, but is far greater in degree.

The elevated railroad structure (taking the Story case as an example), consisted of columns 15 inches square and 14 1/2 feet high, carrying cross-girders 39 inches deep, which in turn supported longitudinal girders 33 inches deep. Upon the longitudinal girders rested cross-ties and rails, thus making the height of the permament structure about 21 feet; the cars were 11 feet above the track, making the total height of structure with cars 32 feet.

The total width of this structure was about 27 feet. It projected over the sidewalk about 2 feet. Only one column was placed in the street in front of plaintiff's premises.

Story Case (90 N. Y., 122) 17th, 18th and 19th Findings of Fact, page 128, opinion of DANFORTH, *J., page 142.*

This viaduct is built upon two lines of iron columns 18 inches square. The columns are 43 feet apart measuring east and west, and 40 feet apart measuring north and south. Upon the top of the columns rest iron beams which support a pavement of asphalt and paving blocks, forming a solid structure from edge to edge. The width of the platform on 155th street is 63 feet. It is 50 feet above the street surface (*fols. 91–92*).

On Eighth avenue the structure has been extended north and south from 155th street to form a quadrilateral measuring 160 feet north and south and 80 feet in width east and west. This so-called "plaza" is also 50 feet above the street, with a solid pavement of asphalt, and extends along 30 feet of plaintiff's 49 feet frontage on Eighth ave-

nue. The edge of the platform is 10 feet from the building line of plaintiff's land.

Between the supporting columns of the viaduct are placed trusses or rods. A stairway is built from the platform of the viaduct in front of plaintiff's land to the southwesterly corner of 155th street and Eighth avenue. There is also, as part of the structure in front of plaintiff's land, a platform or passageway on a level with the stairway of the elevated station, connected with the surface of the viaduct and extending north and south on 155th street, connecting with the elevated railway station. The edge of the platform extends over the sidewalk on Eighth avenue, 10 feet; on 155th street about 2 feet (*fols. 93–97*).

The viaduct is more than twice as high as the elevated railroad's permanent structure.

While the elevated road affects merely the lower portion of a building the viaduct shuts out the light from the entire building.

On 155th street the viaduct is more than twice as wide as the elevated structure.

On Eighth avenue it is more than three times as wide.

The platform of the elevated structure is not solid; the platform of the viaduct is.

The viaduct has a net work of trusses and rods attached to its columns which the elevated structure has not.

On Eighth avenue, opposite plaintiff's premises, the columns of the viaduct are in pairs parallel with each other and forty feet apart. On plaintiff's frontage of 175 feet there are four pairs of columns. In front of the plaintiff's premises on Eighth avenue there are two columns, making ten columns in all. In the Story case, only one column was placed in front of plaintiff's premises.

While the elevated runs on only one side of plain-

tiff's lot in the Story case, the viaduct occupies the street on two sides of this plaintiff's premises.

The surface area of the viaduct which encloses plaintiff is 13,425 square feet; the surface area of an elevated structure along the same frontage on both sides would be 5,535 square feet.

The space in the streets on plaintiff's frontage within the outlines of the viaduct is 671,250 cubic feet; an elevated structure similarly situated would cover only 116,235 cubic feet.

The viaduct extends further over the sidewalk than the elevated structure. In addition to all this, there are the stairways, trusses and rods blocking up the street, and the extensive platform midway between the viaduct and the street.

This viaduct is *sui generis*. We find no case in which the courts have been called upon to define the rights of an abutting owner with regard to such an extensive edifice in the street, or in which they have dealt with such a wholesale destruction of the abutter's easements.

This structure practically turns the streets into a tunnel. To get above it the abutter must build up five stories. He has no easement of access to it from his land as he cannot bridge the intervening gap. Light has to reach him through a slit ten feet wide between his eaves and the edge of the structure. The street is full of columns, rods and trusses.

It is annihilation rather than impairment of the abutter's easements.

II.

Plaintiff established a contract within the contract clause of the Federal Constitution, and his easements of light, air and access were property which could not be taken without due process of law.

The New York Courts have repeatedly declared that the proceedings under which streets in New York City have been opened constitute a contract with the abutting owners.

The statute under which these streets are opened provides that

> " the mayor, aldermen and commonalty of
> " the City of New York shall take and be
> " seized in fee of all said lands * * * in
> " trust, nevertheless, that the same be ap-
> " propriated and kept open for or as a part of
> " the public street, avenue, square or place
> " in like manner as the other public streets,
> " avenues, squares and places in said city
> " are, and of right ought to be."
>
> *Laws of 1813, Chap. 86, Sec. 178.*
> *Laws of 1888, Chap. 402, Sec. 990.*
> *Greater New York Charter, Sec. 990, being Chap. 418 of the Laws of 1903.*

Story vs. *N. Y. El. R. Co.* (*90 New York, 122*), DANFORTH, *J.*, *says*, at *page 160:*

> "As an abutter on the street he has, as I have endeavored to show, a right to the light and air afforded by it. As to him, it would seem that the proceedings by which the land has been taken or the dedication made contains the terms of a contract, and, if so, could be changed neither by the city of its own motion or in the exercise of authority derived from the legislature."

At *page 170*, TRACY, *J.*, says:

> "As the other streets of the city were, or lawfully ought to be, so this street was to be. It was to be an open street; one which would furnish light and air to the abutting property and a free and unobstructed passage to the inhabitants of the city. A covenant to keep a strip of land open as a public street forever is a covenant not to build thereon."

At *page 177:*

> "And we are of opinion that in cases where the public has taken the fee, but in trust to be used as a public street, no structure upon the street can be authorized that is inconsistent with the continued use of the same as an open public street. The obligation to preserve it as an open public street rests in contract written in the statute under which the lands were taken, and it may not be violated by the exercise of any legislative discretion."

In *Lahr* vs. *Met. El. R. Co.* (*104 New York, 268, 290*), the *Court* said of condemnation proceedings under the statute:

> "Such proceedings created not only a valid trust in the city for the purposes expressed, which precluded it from authorizing any other use of the land acquired than that expressly described in the statute (*Cooley on Constitutional Limitations, 331*), but also constitute a contract between the public and the abutting owners severally, by which the liabilities, rights and interests of the respective parties are to be measured and the enjoyment of their respective interests in the property (retained as well as acquired) regulated and determined."

In the same case, at *pages 291 and 292:*

> "The covenant implied from the language of the statute and the proceedings taken

thereunder was made with and intended for the benefit, among others, of abutting owners, and is a covenant which runs with the land and inures to the advantage of each successive grantee, as he succeeds to the title."

The rule was again stated in *Kane* vs. *N. Y. El. R. Co.* (*125 New York, 164, 177*):

The plaintiff is entitled to enforce this contract.

U. S. vs. *Ill. Central R. Co.*, *154 U. S., 225, 238.*

Fisk vs. *Jefferson Police Jury*, *116 U. S., 132.*

By the law of New York, the owner of premises abutting upon the public street has easements of light, air and access in the street, and these easements are property within the protection of the constitution.

Story vs. *N. Y. El. R. Co.*, *90 New York, 122.*

Lahr vs. *Met. El. R. Co.*, *104 New York, 268.*

Kane vs. *El. R. R. Co.*, *125 New York, 164.*

Muhlker vs. *N. Y. & H. R. R. Co.*, *197 U. S., 544.*

In the *Story* case, DANFORTH, *J.*, said at *pages 146 and 147*:

"An easement is property within the meaning of the constitution."

In the *Muhlker* case, after reviewing the elevated railroad cases, Mr. JUSTICE MCKENNA said (*p. 570*):

"When the plaintiff acquired his title, those cases were the law of New York and assured to him that his easements of light and air were secured by contract as ex-

pressed in those cases and could not be taken from him without payment of compensation."

Plaintiff purchased his property in 1886 (*fol. 4*). The Court of Appeals decided the *Story* case in 1882.

III.

The act in question is unconstitutional and void in providing for the erection of the elevated driveway or viaduct without regard to plaintiffs' property or contract rights.

By the law of New York the building of an elevated railroad is a use of the streets inconsistent with the covenant that they shall be maintained as open public streets, and is also a taking of plaintiffs' property.

Story vs. *N. Y. El. R. Co.*, *90 N. Y.*, *122*, and other Elevated cases.
Muhlker vs. *N. Y. & H. R. R. Co.*, *197 U. S.*, *544*.

In the *Elevated Railroad* cases a structure was built by the railroad under statutory authority, for the purpose of running the railroad thereon.

In the *Park Avenue* cases a railroad already existed in the streets in a cut. A statute was passed commanding the railroad to build a viaduct for its tracks.

In the case at bar there is no railroad—simply a structure; and that structure built by The City of New York pursuant to statute.

It was not the railroad, but the permanent struc-

ture which formed the basis of the elevated railroad decisions.

> See opinion of DANFORTH, *J.*, in the *Story case, pp. 161–162;* opinion of TRACY, *J.*, in the same case, *pp. 169, 170.*

This is completely established by the decisions in the case of railroad tracks laid in the surface of the street, where it is held that an abutter cannot recover.

> *Kellinger* vs. *Forty-second Street R. R. Co., 50 New York, 206.*
> *Fobes* vs. *R. W. & O. R. R. Co., 121 New York, 505.*

If an abutter cannot recover in the case of a railroad without a structure, and can recover in the case of a railroad with a structure, it needs no argument to show that it is the structure and the structure alone which infringes the abutter's rights.

The purpose of the structure is immaterial; it is the permanent interference with the abutter's easements which is decisive.

This doctrine has received repeated judicial expression. For example, see the opinion of PECKHAM, *J.*, in the *Fobes case, at p. 517:*

> "It is not intended in the Story case to overrule or change the law in regard to steam surface railroads. The case embodied the application of what was regarded as well established principles of law to a new combination of facts, such facts amounting, as was determined, to an absolute and permanent obstruction in a portion of the public street, and in a total and exclusive use of such portion by the defendant, and such permanent obstruction and total exclusive use,

it was further held, amounted to taking of some portion of the plaintiff's easement in the street for the purpose of furnishing light, air and access to his adjoining lot. This absolute and permanent obstruction of the street, and this total and exclusive use of a portion thereof by the defendant were accomplished by the erection of a structure for the elevated railroad of the defendant; which structure is fully described in the case as reported.

The structure, by the mere fact of its existence in the street, permanently and at every moment of the day took away from the plaintiff some portion of the light and air which otherwise would have reached him, and in a degree very appreciable, interfered with and took away from him his facility of access to his lot; such interference not being intermittent and caused by the temporary use of the street by the passage of the vehicles of the defendant while it was operating its road through the street, but caused by the iron posts and by the superstructure imposed thereon, and existing for every moment of the day and night. Such a permanent, total, exclusive and absolute appropriation of a portion of the street as this structure amounted to, was held to be illegal and wholly beyond any legitimate or lawful use of a public street. The taking of the property of the plaintiff in that case was held to follow upon the permanent and exclusive nature of the appropriation by the defendant of the public street or of some portion thereof."

The *Muhlker* case (*197 U. S., 544*), is to the same effect. In that case, at *page 568*, Mr. Justice McKenna said :

"In the Story and Lahr cases the railroads were imposed for the first time on the street. In the case at bar, the Harlem R. R. had occupied the surface of the street and was changed to the viaduct, but in the Story

> and Lahr cases it was not the fact that the railroads were imposed on the streets for the first time that determined the judgment rendered; it was the fact that trains were run upon the elevated structure interrupting the easements of light and air of the abutting owners. It was this that constituted a use inconsistent with the purpose of the street. 'It was the elevation of the structure,' to quote again from the Story case, 'useless for general street purposes.' This situation of the railroad was especially dwelt upon in the Story case, and that case was distinguished thereby from the surface railway cases."

The conceded facts, repeated in the trial Courts findings of fact, recognized by both the Appellate Division and the Court of Appeals, together with the physical character of the viaduct, show an unparalleled destruction of the abutter's easements of light, air and access.

The Elevated Railroad decisions declare such an injury to be a taking of property, as well as a breach of the contract to maintain the streets as open streets. This Court has in three recent cases directly sustained this view.

> *Muhlker* vs. *N. Y. & H. R. Co.*, *197 U. S.*, *544.*
>
> *Birrell* vs. *N. Y. & H. R. Co.*, *198 U. S.*, *390.*
>
> *Kierns* vs. *N. Y. & H. R. Co.*, *198 U. S.*, *390.*

In the *Muhlker* case, the prevailing opinion by Mr. Justice McKENNA concludes as follows:

> "When the plaintiff acquired his title those cases (the Elevated Railroad cases) were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those

cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism ; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the *Elevated Railroad cases* and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

IV.

The obligation to compensate plaintiffs for the destruction of these easements cannot be avoided upon the ground that the viaduct is a proper street use.

The majority opinion of the Court of Appeals concedes that the easements of light, air and access have been impaired (*fol. 74*).

It then states that the fee of the street having been acquired according to the statute, it must be assumed that full compensation is made to the

owners of the land through which the streets were laid out, and that they hold their titles subject to all legitimate and proper uses to which the streets and public highways may be devoted.

Abutting owners hold subject to the right of the public to grade and improve the streets.

It is stated that the above rule may not be applicable to peculiar and extraordinary changes, where the natural surface has been changed by artificial means, such as the construction of a railroad embankment, or a bridge over a railroad, making elevated approaches necessary.

The Court then cites an extract from the opinion in *Radcliff's Executors* vs. *The Mayor*, *4 New York, 195*, the leading change of grade case in New York, to the effect that loss from change of grade is *damnum absque injuria*, and refers to the case of *Fries* vs. *N. Y. & H. R. R. Co.* (*169 New York, 270*) and the cases there collected, then to the case of *Transportation Company* vs. *Chicago* (*99 U. S.*, 635), where plaintiff's access to a wharf was temporarily impeded, while the City of Chicago was engaged in constructing a tunnel under the Chicago River, and the authorities there cited, and concludes—

> "In the case under consideration, as we have seen One Hundred and Fifty-fifth street continued west to Bradhurst avenue. There it met a steep bluff seventy-feet high, on the top of which was St. Nicholas place. The title of the street up the bluff had been acquired and recorded, but it had never been opened and worked as a street. The bluff was the natural contour of the surface, and for the purpose of facilitating the easy and safe travel of the public from St. Nicholas place to other portions of the City the legislature authorized the construction of the viaduct in question. It is devoted to ordinary traffic by teams, vehicles and pedes-

trians. It is prohibited for railroad purposes. It is one of the uses to which public highways are primarily opened and devoted. It was constructed under legislative authority in the exercise of governmental powers for a public purpose. It is not, therefore, a nuisance and the plaintiff is not entitled to have its maintenance enjoined or to recover in this action the consequential damages sustained."

JUDGE VANN dissented in the following words :

"I dissent upon the ground that the construction by a municipal corporation of a new and independent street in the form of a bridge fifty feet high, and sixty-three feet wide, extending lengthwise through block after block over an existing street, which, graded and paved for years, is left undisturbed except by the huge columns supporting the elevated structure, is neither the improvement of the street as a street, nor a proper street use sanctioned by precedent, or coming within the reasonable contemplation of the parties when the fee of the surface street was acquired from the abutting owner, who has no access to the aerial street from his own premises, and when this is done without compensation, it is a taking of private property for public use in direct violation of the constitution."

JUDGE BARTLETT dissented as follows :

"I agree with Judge Vann's memorandum of dissent.

Under the judgment about to be made the city could bridge Fifth avenue, from 110th street to Washington square, at a level above the heights of the adjoining structures, thereby impairing the light, air and access of every residence and business building and under the plea of a street use escape all liability for damages. If this can be done, it simply amounts to confiscation.

The prevailing opinion cites *Radcliff's Executors* vs. *Mayor, etc., of Brooklyn* (*4 N. Y., 195*), and the line of cases following it, which hold that the legitimate change of the grade of a street to the damage of abutting lot owners is *damnum absque injuria*.

In the case at bar there is no change of grade; it is stipulated in the case as follows: 'The grade and surface of 155th street and Eighth avenue, in front of the plaintiff's premises, as they existed on June 15th, 1887, have not been changed by the erection of the viaduct, and the said surfaces of said streets remain as before, open to the public, except for the obstruction by the columns of the viaduct as before stated.'

It is thus apparent that the change of grade cases have no application.

It is to be said of these cases that they involve a principle that has been condemned in many jurisdictions and the hardship of which has been cured in some of the States by constitutional amendment providing for the payment of such damages. It is a doctrine which ought not to be extended.

In *Reining* vs. *N. Y. & W. Ry. Co.* (*128 N. Y., 157, 164*), Judge ANDREWS, in applying the law of the elevated railroad cases, as laid down in the Story case, said: 'It is no longer open to debate in this State that owners of lots abutting on a street the fee of which is in the municipality for street use, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation.'

I am of opinion that the structure in the case before us is a bridge built along and above a street and cannot be regarded as a 'street use.'

If such an erection can be permitted to exist, it falls within the doctrine of the elevated road cases, and, notwithstanding the title of the streets is in the city, the abutting owner is entitled to compensation for such damages as he has suffered."

It is true that the right of the city over the streets is absolute for all proper street purposes, but proper street purposes end where they infringe upon the rights of the abutters, and thereafter the city's rights are not absolute, but contingent upon the payment of compensation.

The question has been definitely and exactly settled for the State of New York since the *Story* case.

First.—It is not a proper street use to erect in the street a permanent structure like the elevated railroad structure or the Park avenue viaduct or this viaduct.

Second.—Plaintiffs' easements of light, air and access in and over the street are property which cannot be taken by such a structure under the constitution.

The elevated railroad cases and the *Muhlker* case are specific authority for plaintiff upon every point in this case.

The constitutional provision with regard to the taking of property was designed to protect the individual, hence it is the taking of the abutter's easements which gives the right to compensation, not the public use which avoids the duty of compensating.

Plaintiffs' easements were in and over the surface of 155th street and Eighth avenue proper, in the streets as they existed prior to this structure and as they now exist.

Plaintiffs' damage occurred through the encumbering of the surface of the existing streets with pillars, rods and trusses, and the placing of the platform of the structure over all.

It is nothing to the abutter that five stories above

his head there is a broad boulevard. His easements of light, air and access do not attach to the surface of that elevated structure; his easement of access could never attach to it, owing to the space which separates its edge from the building line of his land, and which he has no right to bridge. The easements are down in the old streets where his building is placed. It is the use of the old streets which must be considered. That use is not a street use.

The street's surface was appropriated to support this structure. The street was, in effect, turned into a building lot. On the surface of the viaduct there is a street use, but down below, where plaintiffs' easements are there is a structural use, a *pro tanto* closing of the street, which is inconsistent with a street use, and which is in derogation of plaintiffs' easements.

The street use on the surface of the viaduct removes through traffic to a point far above the abutter's building. Persons coming to his premises can not as a practical matter use the viaduct. Those using the viaduct can not come to the abutter's place of business without climbing down several flights of stairs at Eighth avenue, or coming back under the viaduct from one end or the other of the structure.

This structure is an obliteration of the trust, subject to which the city holds the streets. Either the words "to be kept open * * * forever * * * as other public streets * * * are and of right ought to be," have lost their meaning, and the judicial construction given them in the Elevated Railroad cases has been abrogated, or the Legislature and the City of of New York have exceeded their power and authority and confiscated plaintiff's property.

Historically there is no warrant for this structure. See *Story* case and *Knox* vs. *Mayor* (*55 Barb.*, *404*),

decided in 1868. This was a suit in equity brought to compel The City of New York to remove a bridge erected across Broadway at Fulton street. The purpose of the bridge was to permit foot passengers to pass and repass. The abutters owned the fee. DANIELS, *J.*, at *page 414*, said:

> "This bridge is a structure permanently erected over the streets, appropriating, for its support, and the avenues to it, thirteen feet, in the aggregate, of that part of the street which had been devoted to the use and convenience of pedestrians. It was not done for the purpose of improving the easement upon and over the land itself, which the public were and are entitled to enjoy; and it has no tendency whatever to produce any such improvement, but for the purpose of creating a new and distinct servitude, above the streets and above the land upon which the public easement was created. The fact that a portion of the street has been exclusively devoted to the support of this structure is sufficient to show that it can be no development or improvement of the pre-existing easement, for that actually deprives the public of the use of so much of the easement itself as the bridge requires for its own support. If the appropriation of a portion of the street or sidewalks can be justified for this purpose, it many also be for the support of any other device that can be made useful in transferring persons from one side to the other side of a blockaded or crowded street. If the object in view is sufficient to justify the exercise of the power, it may be used in any manner that either ingenuity or fancy may suggest. And if a bridge is found to fail in fulfilling the expectation in this respect of those who designed and erected it, hoisting apparatus with cranes and engines for its use, may be substituted in its place. And this may be done not only where the streets are liable to become blockaded and dangerous, but whenever that condition may

> be reasonably apprehended. If this may be done, nothing would appear to be in the way of a raised walk, not only across, but along the streets themselves. The power over the streets that will authorize and sanction one, will permit the existence of the others. If it could be sustained, it is capable of being used in such a manner as not only to seriously impede and impair the public utility of streets as avenues for travel, but, beyond that, it would be in danger of rendering them not only annoying, but useless to those who should endeavor to carry on business upon them."

The change of grade cases discussed in the majority opinion have no application. It was only by expressly contradicting a fact found below, a power which the Court of Appeals wholly lacks, that this argument could be advanced. This fact was recognized by the dissenting judges.

The Agreed Statement of Facts and the findings of the trial Court state:

> "The grades and surfaces of 155th street and Eighth avenue in front of plaintiff's premises as they existed on June 15, 1887, have not been changed by the erection of the viaduct and the said surfaces of such streets remain as before, open to the public, except the obstruction by the columns of the viaduct as before stated" (*fols. 16, 25*).

This stipulated and found fact is fatal to any attempt to justify this structure as change of grade. If the old grade remains as before, it has not been changed.

In *Manhattan Railway Co.* vs. *Mayor* (*89 Hun, 429*), action was brought by the Elevated Railroad to recover damages by reason of this viaduct. The Appellate Division, First Department, refused to regard the viaduct as a change of grade. PARKER,

J., who subsequently, as Chief Judge of the Court of Appeals, participated in the decision of the Park avenue cases, said, at *page 434:*

> "The statute did not authorize the Commissioner of Public Works to change the grade, but to improve and regulate the use of 155th street, and for that purpose to erect and construct over and along said street * * * an elevated iron roadway, * * * and the fact is that the grade of the street was not changed by the building of the viaduct or when it was built."
>
> *Sauer* vs. *Mayor*, *44 App. Div.*, *305* (*Appendix I of this brief*).

By Section 1 of the Act, Chap. 576, Laws of 1887, the Commissioner of Public Works in the City of New York is authorized

> "to improve and regulate the use of 155th street in said city, and for that purpose to erect and construct over and along said street from the easterly line of St. Nicholas place and McComb's Dam Bridge an elevated iron roadway, viaduct or bridge" (*fol. 26*).

By Section 2, the Commissioner

> "shall make such changes in the grade lines or streets along said elevated roadway, viaduct or bridge as may be made necessary to meet the requirements of the same" (*fol. 27*).

Here is legislative recognition that this is not a change of grade, but a bridge or elevated roadway over and along the street.

The prevailing opinion speaks of the bluff as the natural contour of the surface and of the purpose of the viaduct to facilitate travel from St. Nicholas place to other portions of the city.

The viaduct does not facilitate travel on 155th street as originally laid out. It extends out of

reach over that street for block after block. Persons using the viaduct can reach the abutter on 155th street only by climbing down several long flights of stairs at Eighth avenue, or by going to one end or the other of the structure and retracing their steps beneath it.

It diverts the current of travel from the old 155th street to a practically inaccessible roadway over head.

All the benefit accrues to the west half of Manhattan Island and the Bronx. All the injury falls on the east half of the island. There is no legal justification for the view that the former portions of the city are dominant, the latter portion servient.

If this structure is a benefit to the city as a whole, the city as a whole should bear the burden. It should not be imposed entirely upon the one class of persons, who are not benefited, viz., the abutters on 155th street, as originally and now maintained.

The remaining consideration of the prevailing opinion is that this abutter is powerless, because this viaduct was constructed under legislative authority in the exercise of governmental powers for a public purpose.

This is the doctrine upon which the Court of Appeals based the reversal of the *Lewis* case and the decision of the *Muhlker* and other *Park avenue* cases, and it is this doctrine which this Court has declared erroneous in the *Muhlker*, *Kierns* and *Berrill* cases.

Muhlker vs. *N. Y. & H. R. R. Co., 197 U. S., 544.*
Berrill vs. *N. Y. & H. R. R. Co., 198 U. S., 390.*
Kierns vs. *N. Y. & H. R. R. Co., 198 U. S., 390.*

In the prevailing opinion, *Muhlker* case, at *pages*

569 and 570, Mr. *Justice* McKENNA dealt with this argument as follows:

> "Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in ocupying the viaduct, it is said, was the act of the State. But this defense was made in other cases. It did not give the Court much trouble. It is urged, however, now with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the Court of Appeals. The Court said:
>
> 'The decisions in the Elevated Railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for.' And, further, making distinction between those cases and that at bar, said: 'The State could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway.' And the Court concluded that it was the State, not the railroads, who did the injury to plaintiff's property. The answer need not be hesitating. The permission or command of the state can give no power to invade privade rights, even for a public purpose, without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the state. The railroads paid one-half of the expense of the change, 'by the command of the statute, and hence under compulsion of law,' to quote from the

Court of Appeals. The public interest, therefore, is made too much of. It is given an excessive, if not a false quantity. Its use as a justification is open to the objection made at the argument, it enables the state to do by two acts that which would be illegal if done by one. In other words, as, under the law of New York, the state can authorize a railroad to occupy the surface of a street, it can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the *Story* case that 'the public purpose of a street requires of the soil the surface only.' And this was followed in *Fobes* vs. *Rome, W. & O. R. Co., 121 N. Y., 505, 8 L. R. A., 453, 24 N. E., 919*, where a steam railroad was permitted upon a street without liability for consequential damages to adjoining property. The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the *Elevated Railroad cases*. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism, and when there is a diversity of state deci-

> sions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the *Elevated Railroad cases* and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

There is no ground of distinction in the fact that the legislative authority was, in the case at bar, given directly to the city. The question is solely one of the extent of legislative power. It is immaterial who is the beneficiary of that power.

V.

This case is stronger for the abutter than the Muhlker case.

Mr. Justice HOLMES, in his dissenting opinion in the Muhlker case, calls attention to certain differences in fact between that case and the Elevated Railroad cases as tending to support the view that the Court of Appeals decisions in the Park avenue cases were made upon distinctions in fact, rather than as overruling the principle of law governing the Elevated Railroad cases.

On page 572 reference is made to the fact that the railroad had the right to maintain its structures in Park avenue, whereas in the Elevated Railroad cases pillars were planted in the street without right as against the plaintiff.

On page 574 attention is called to the fact that

in the Elevated Railroad cases defendant has impaired the abutter's access to the streets, while in the Park avenue cases the most obvious aspect of the change in Park avenue was that the whole street had been opened to travel and an impassable barrier removed as a result of the structure, and that it was consistent to say that access was the foundation of the whole question, and the right to light and air a parasitic right incident to the right to have the street kept open.

On page 576 reference is again made to the fact that the easement of access was not impaired, that the abutter's sole damage was as to his easements of light and air.

We refer to these distinctions in fact between the Elevated Railroad cases and the Park avenue cases for the purpose of showing that the case at bar is far stronger for the abutter than was the Muhlker case.

We show here abutters' easements of light, air and access undiminished by prior grant or servitude and a structural use detrimental to all of these easements and unquestionably destructive of the street, as opposed to an impaired easement of access in the abutters and a structural use beneficial to access and to the street itself in the Muhlker case.

Here there is a complete identity with the Elevated Railroad cases as to the abutters' property rights and the structural use of the street. The legal principles involved are also exactly the same.

In three separate and recent instances this Court has reversed the Court of Appeals and sustained the rights of abutters upon Park avenue upon a state of facts less cogent than those presented by the case at bar.

We respectfully submit that the action so taken

by this Court should preclude the assertion of a contrary principle, as to this case, also arising in the State of New York, involving the same legal considerations as, and decided by the Courts of New York by reason of their erroneous decisions in, the Park avenue cases.

Plaintiff's contract right arises by virtue of the Act of 1813 and the rule of property laid down in the Story case in 1882, which has been constantly reiterated by the New York courts.

Upon the faith of the statutory contract and the judicial construction given it plaintiff purchased his property in 1886 (*fol. 21*), thus becoming a party to that contract, which extended to all abutters.

The construction of a statute by a State Court becomes a part of the statute, and rights acquired under it may not be impaired by a change of construction.

> *Ohio Life Ins. Co.* vs. *Debolt*, *16 How. (U. S.), 416.*
>
> *Gelpecke* vs. *Dubuque*, *1 Wall., 175; 17 L. ed., 520.*
>
> *Louisiana* vs. *Pillsbury*, *105 U. S., 278; L. ed., 1090.*

In *Louisiana* vs. *Pillsbury*, the legislature of Louisiana in 1852 passed an act authorizing the City of New Orleans to issue certain bonds. The highest court of the State construed this act as constitutional under the State Constitution, and bonds were issued.

In 1876 the Louisiana legislature passed another act which this Court subsequently held to be an impairment of the obligation of the bonds. The Supreme Court of Louisiana then changed its construction of the Louisiana Constitution and held the act of 1852, under which the bonds were issued, unconstitutional.

Upon writ of error to this Court, the question arose which of the two constructions of the highest Court of Louisiana were binding.

This Court said (105 U. S., 294):

> "The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction, so far as contract obligations incurred under it are concerned constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it. *Christy* vs. *Pridgeon*, *4 Wall.*, *196*, and *Shelby* vs. *Guy*, *11 Wheat.*, *361*. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in the interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the Chief Justice in the recent case of *Douglas* vs. *County of Pike*, *101 U. S.*, *677*, *687*. 'The true rule,' he observes, 'is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'"

In all essential particulars, the case cited is identical with the case at bar. The first statute in our case contained a covenant under which the City acquired streets, which the State Courts construed as making the streets exempt from elevated structures.

Upon the faith of the law as thus interpreted, this plaintiff acquired his property.

The New York Legislature then passed the act authorizing this viaduct, and changed its construction of the Act of 1813, not expressly, but in effect, declaring that it was no longer a bar to elevated structures.

We respectfully submit that the result reached in the Louisiana case and in the Muhlker, Berrill and Kierns cases should follow in the case at bar.

VI.

The judgment under review should be reversed and the case remanded.

ABRAM I. ELKUS,
CARLISLE J. GLEASON,
Of Counsel for Plaintiffs in Error.

APPENDIX I.

REPORTED 44 APP. DIV., PAGE 305.

GEORGE W. SAUER, RESPONDENT, VS. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, APPELLANT.

Appeal by the defendant, The Mayor, Aldermen and Commonalty of the City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the Clerk of the County of New York on the 27th day of October, 1898, upon the verdict of a jury for $30,000, and also from an order entered in said clerk's office on the 19th day of October, 1898, denying the defendant's motion for a new trial made upon the minutes.

THEODORE CONNOLY, for the Appellant.
EDWARD C. JAMES, for the Respondent.

MCLAUGHLIN, J.:

The City of New York, in 1890, commenced to construct and in 1893 completed, a viaduct, extending from St. Nicholas avenue through 155th street to a bridge over the Harlem River. The plaintiff owned certain property situated on 155th street in front of which the viaduct passes, and this action was brought to recover the sum of $90,000 damages alleged to have been sustained by him, upon the ground that the construction and operation of the viaduct diminished the easements of light, air and access appurtenant to and connected with his property.

The complaint contained four separate causes of action, (1) damages to the fee and to the rental

value of the premises; (2) damages to the plaintiff's business conducted thereon; (3) damages caused by the negligence of the city in excavating for the viaduct, and (4) damages for negligence of the city resulting in the bursting of a water meter. At the trial the complaint was amended by striking out the claim for damages to the fee and for negligence, and after such amendment the trial Court held that only one cause of action was alleged, namely, for damages to the value of the use and occupation of the premises from the commencement of the construction of the viaduct to the commencement of the action. Both parties were apparently satisfied with the construction thus put upon the complaint, because neither of them excepted to the ruling, and the trial proceeded and the issues were finally submitted to the jury upon that theory, the learned trial Justice stating to the jury, at the request of the defendant's counsel, "This action is limited to rental damage which accrued, if at all, prior to November 10th, 1896," and that by rental damages he meant the loss of "usable value." The jury rendered a verdict in favor of the plaintiff for $30,000, and from the judgment entered thereon and from the order denying a motion for a new trial the defendant has appealed. It asks for a reversal of the judgment principally upon the grounds: (1) That an action of this character cannot be maintained against the city; (2) that the Court erred in permitting the complaint to be amended at the trial, and in not dismissing it as to the second cause of action alleged, and (3) that the Court erred in receiving, against the defendant's objection, testimony tending to establish the profits of plaintiff's business conducted upon the premises for a term of years immediately preceding the construction of the viaduct, and that for a number of years following its construction he had sustained a loss.

As to the first ground of error alleged, we think it cannot be seriously questioned but that the city is liable to an abutting owner for whatever damage it may cause to him by the erection of a permanent structure in a public street, immediately in front of and adjoining his property, which deprives him of the easements of light, air and access appurtenant to and connected therewith. Easements of this character are property (Kane vs. New York El. R. R. Co., 125 N. Y., 164), and property cannot be taken from the owner "for public use without just compensation" (Const., Art. 1, Sec. 6). The right to maintain an action to recover damages for the invasion of the owner's rights by the city in this way is in all respects analogous to the elevated railroad cases, and we think the principle there applied must be applied here against the city. The construction of the viaduct was something more than a mere change of the grade of the street (Manhattan Ry. Co. vs. Mayor, 89 Hun, 429). It was the appropriation of the street itself in such a way that the plaintiff was deprived of his property for which the city must pay a just compensation.

Neither do we think it can be seriously questioned but that the trial Court had the power to permit the complaint to be amended by striking out the cause of action for damages to the fee and also for negligence; and to permit the cause of action for damages to the use and occupation to be more fully and amptly stated (Code Civ. Proc., Sec. 723). No counterclaims had been interposed by the defendant, and the plaintiff, therefore, had the right, with the consent of the Court, at any time before the case was finally submitted to the jury, to withdraw from their consideration any or all of the causes of action alleged. The amendment did not introduce a new cause of action. All that it did was to omit the claim for fee damages and for negligence, and to amplify or state more fully the claim for damages

to the rental value. The Court so held at the time the amendment was made, and also held that the only recovery which could be had was for damages to the use and occupation, and that but a single cause of action was alleged in the complaint as amended. The defendant acquiesced in these rulings and took no exception to them. It is clear, therefore, that the Court correctly denied the motion made by defendant at the close of the trial to compel plaintiff to elect upon which cause of action he would ask a verdict, and also correctly denied the motion to strike out all evidence offered as to the second cause of action. Under the previous rulings there was but one cause of action alleged in the complaint. The trial had proceeded upon that theory, and the evidence which had been admitted was directed to that one issue.

This brings us to the consideration of the remaining question, which is a much more serious one, and that is whether testimony was properly admitted as to the profits which the plaintiff had made in his business prior to the construction of the viaduct and the losses which he had sustained thereafter. The plaintiff himself was sworn and asked the following questions: "Q. Will you tell me what your annual profits were from these premises in the use of occupation and business as you carried it on during the years before the viaduct; state what it averaged annually?" and "Q. After the viaduct came there what did your annual profits from the use and occupation of the business there average, if anything?" Both questions were objected to by the defendant upon the ground that they were irrelevant, incompetent and immaterial, and called for an improper measure of damages, which objections were overruled and an exception taken in each instance. The witness answered that during the four years immediately preceding the construction of the viaduct his profits averaged about $15,000

per year, and that since its construction he had lost money each year in his business. One of the plaintiff's witnesses was also permitted, against the defendant's objection, to give testimony of a similar character. We think this testimony was improperly admitted. The profits of a business are too uncertain, and depend upon too many contingencies to safely be accepted as any evidence of the usable value of the property upon which the business is carried on.

Profits depend upon the times, the amount of capital invested, the social, religious and financial position in the community of the one carrying it on, and many other elements which might be suggested. What one man might do at a profit, another might only do at a loss. That the plaintiff had made profits in his business in the past was no indication that he would continue to make them in the future, even had the viaduct not been constructed. This testimony being admissible, the defendant's objections thereto should have been sustained (Matter of Gilroy, 26 App. Div., 314; Masterton vs. Village of Mount Vernon, 58 N. Y., 391; Newton vs. Armstrong, 19 N. Y. Supp., 573; Edmands vs. City of Boston, 108 Mass., 535; Cobb vs. City of Boston, 109 *id.*, 438; Becker vs. Philadelphia & Reading Terminal R. R. Co., 177 Penn. St., 252).

In the Matter of Gilroy (*supra*) the Court said: "On the hearing before the commissioners the appellants sought to prove the profits they had made in their business during a term of years. This testimony was rejected; we think properly. It is doubtless competent for the landowner to prove the value of the land taken from him for the purpose for which it may properly be used, and he is entitled to that value even though he may put the property to a different use. It was, of course, competent to show that the property was used for business purposes, and was suitable for such purposes, for as a

rule business property demands a higher price than property used merely for the purpose of residence. It was, also, competent to show the general character of the business, for property desirable or available for business of a certain character commands higher prices than property only suitable for business of another character, but the profits the occupants had realized from the business carried on upon the property does not tend to show the value of the property itself. * * * The profits of the business would naturally depend far more largely upon the judgment, forethought and business skill of the appellants, the use of their capital and the condition of trade, than upon the value or location of the particular property upon which the business was conducted."

But it is unnecessary to further consider the subject. The testimony was inadmissible, and could not be used for the purpose intended. It was just the kind of evidence to injure the defendant by taking the minds of the jury from the real fact to be ascertained, namely, the damages to the usable value, and that it did injure the defendant is evidenced by the verdict itself.

It follows that for the error thus committed the judgment must be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and INGRAHAM, JJ., concurred.

Judgment reversed, new trial granted, costs to appellant to abide event.